

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL A. HOWL,

Plaintiff,

v.

BANK OF AMERICA, N.A.; BAC HOME
LOAN SERVICING, LP; PRLAP, INC.;
RECONTRUST, N.A.; and DOES 1-50,

Defendants.

No. C 11-887 CW

ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS AND
DENYING
DEFENDANTS' MOTION
TO STRIKE
(Docket Nos. 41
and 42)

_____/

Pro se Plaintiff Michael A. Howl alleges that Defendants Bank of America, N.A.; BAC Home Loan Servicing, LP; PRLAP, Inc.; and ReconTrust Company, N.A. breached their mortgage contract with him and committed fraud with respect to that contract. Defendants move to dismiss Plaintiff's first amended complaint (1AC) and to strike portions thereof. Plaintiff opposes the motions. Having considered the papers filed by the parties, the Court GRANTS Defendants' motion to dismiss and DENIES Defendants' motion to strike.

BACKGROUND

The facts set forth herein are those alleged in Plaintiff's 1AC and in the documents of which Defendants have requested judicial notice, without objection from Plaintiff.

On or about August 23, 2007, Plaintiff obtained a loan from Bank of America for \$1.5 million, secured by a deed of trust for his home located at 288 Love Lane in Danville, California. Jared, a mortgage broker, who was purportedly the agent of Bank of America, told Plaintiff that if he made payments as calculated

1 under the terms of the loan, Plaintiff would own the property at
2 the end of the loan period and that the loan was a "standard" and
3 "normal" loan. 1AC ¶¶ 31-32. During the life of the loan,
4 Defendants allegedly "failed to properly credit payments made,
5 incorrectly calculated interest on the accounts, and have failed
6 to accurately debit fees." Id. at ¶ 37.

7 In 2009, Defendants informed Plaintiff that Bank of America
8 considered him to be delinquent on his loan. On or about
9 September 14, 2010, Defendants recorded a Notice of Default and
10 Election to Sell Under Deed of Trust on the Love Lane property.
11 On December 20, 2010, a Notice of Trustee Sale was recorded on the
12 property. BAC Home Loan Servicing provided declarations in
13 support of both of the documents that were recorded.

14 At some point, Plaintiff made requests to BAC Home Loan
15 Servicing for information clarifying the amount that he allegedly
16 owed and what authority it had to foreclose on his loans. BAC
17 Home Loan Servicing did not respond to Plaintiff's requests.

18 Plaintiff filed his action in Contra Costa County Superior
19 Court on January 21, 2011. Defendants removed Plaintiff's action
20 to federal court on February 24, 2011. On August 17, 2011, upon
21 motion from Defendants, the Court dismissed Plaintiff's first
22 complaint and granted him leave to amend certain claims.

23 On August 30, 2011, Plaintiff filed his 1AC. In it, he
24 re-asserted certain claims from his original complaint and added
25 several new claims. He asserts claims for: (1) breach of
26 contract; (2) violation of the Real Estate Settlement Procedures
27 Act (RESPA); (3) injunctive relief; (4) fraud and
28 misrepresentation; (5) rescission of the mortgage contract based

1 on TILA violations and fraud; and (6) unfair business practices in
2 violation of California's Unfair Competition Law (UCL).

3 Defendants move to dismiss the IAC in its entirety and to strike
4 certain allegations contained within it.

5 DISCUSSION

6 I. Motion to Dismiss

7 A. Legal Standard

8 A complaint must contain a "short and plain statement of the
9 claim showing that the pleader is entitled to relief." Fed. R.
10 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
11 state a claim, dismissal is appropriate only when the complaint
12 does not give the defendant fair notice of a legally cognizable
13 claim and the grounds on which it rests. Bell Atl. Corp. v.
14 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
15 complaint is sufficient to state a claim, the court will take all
16 material allegations as true and construe them in the light most
17 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
18 896, 898 (9th Cir. 1986). However, this principle is inapplicable
19 to legal conclusions; "threadbare recitals of the elements of a
20 cause of action, supported by mere conclusory statements," are not
21 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)
22 (citing Twombly, 550 U.S. at 555).

23 When granting a motion to dismiss, the court is generally
24 required to grant the plaintiff leave to amend, even if no request
25 to amend the pleading was made, unless amendment would be futile.
26 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
27 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
28 amendment would be futile, the court examines whether the

1 complaint could be amended to cure the defect requiring dismissal
2 "without contradicting any of the allegations of [the] original
3 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
4 Cir. 1990).

5 B. Discussion

6 1. General Compliance with Rule 8(a)

7 Federal Rule of Civil Procedure 8(a) requires a plaintiff to
8 present his or her case in a pleading that contains a "short and
9 plain statement" showing that the pleader is entitled to relief.
10 Defendants argue that Plaintiff has generally failed to meet this
11 requirement, because he has failed to allege facts sufficient to
12 meet the basic elements of his asserted claims and because
13 "Defendants cannot ascertain which of Plaintiff's causes of action
14 are specific to Bank of America, N.A. or to ReconTrust Company,
15 N.A. or PRLAP, Inc." Mot. at 5.

16 While Plaintiff sometimes uses general terms for Defendants
17 without specifically naming a particular defendant, Plaintiff
18 makes clear which Defendants he charges in each cause of action.
19 For the second, third, fourth, fifth and sixth causes of action,
20 Plaintiff specifically states the defendant against whom he is
21 making the claim in the title of the relevant section of the 1AC.
22 In the allegations specific to the first cause of action for
23 breach of contract, Plaintiff specifies that Bank of America is
24 the defendant with whom Plaintiff had a contract and who
25 considered him to be delinquent on his loan. While Plaintiff also
26 uses general terms that could be interpreted to refer to other
27 Defendants elsewhere in the section specific to his breach of
28 contract claim, he clarifies in his opposition that this claim is

1 made against only Bank of America. Thus, Defendants have
2 sufficient notice of the conduct with which each is accused.

3 While Plaintiff may have failed to plead facts sufficient to
4 support certain claims, this argument is more appropriately
5 addressed in relation to each claim individually, which the Court
6 does below.

7 2. Breach of contract claim against Bank of America

8 Plaintiff brings a new cause of action for breach of contract
9 against Bank of America. Plaintiff alleges that Bank of America
10 breached a contract with him when it "claimed that Plaintiff was
11 delinquent and attempted to collect additional money in excess of
12 the amount due under the terms of the contract" and by "failing to
13 properly credit payments and continuing to file a Notice of
14 Default and Notice of Trustee Sale in violation of the terms of
15 the Contract." 1AC ¶¶ 17-18. Plaintiff also alleges that, at the
16 time, he "was current under the terms of the Contract," because he
17 "had made at least the minimum payments under the terms of the
18 loan as the terms had been represented to Plaintiff when the loan
19 was originated." Id. at ¶¶ 13, 18.

20 To assert a cause of action for breach of contract, a
21 plaintiff must plead: (1) the existence of a contract; (2) the
22 plaintiff's performance or excuse for non-performance; (3) the
23 defendant's breach; and (4) damages to the plaintiff as a result
24 of the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas
25 Co., 116 Cal. App. 4th 1375, 1391 n.6 (2004).

26 Defendants argue that, while Plaintiff refers generally to a
27 promissory note and Deed of Trust, he does not attach a copy of
28 any agreement between the parties or set forth any particular

1 terms of such agreements, and has thus failed properly to allege
2 the existence of a contract. "If the action is based on an
3 alleged breach of a written contract, the terms must be set out
4 verbatim in the body of the complaint or a copy of the written
5 instrument must be attached and incorporated by reference." Fid.
6 Nat'l Title Ins. Co. v. Castle, 2011 U.S. Dist. LEXIS 141297, at
7 *41 (N.D. Cal.) (quoting Otworth v. S. Pac. Transp. Co., 166 Cal.
8 App. 3d 452, 459 (1985)). Defendants are correct that Plaintiff
9 has failed to do so here.

10 Defendants also state that Plaintiff has not sufficiently
11 identified the facts constituting a breach of the contract. In
12 response, Plaintiff points to the language in his complaint in
13 which he makes general allegations that Bank of America failed to
14 credit Plaintiff's payments correctly and attempted to collect
15 additional money beyond the amount due under the contracts between
16 the parties. However, Plaintiff does not state which provisions
17 Bank of America is alleged to have violated or how Bank of
18 America's collection attempts or crediting of Plaintiff's payments
19 violated any particular provisions. On that basis, the Court
20 finds that Plaintiff has not adequately plead that Bank of America
21 breached a contract.

22 Defendants also argue that Plaintiff's failure to perform his
23 obligation to make the monthly payments precludes him from
24 bringing a breach of contract claim. Defendants state that
25 Plaintiff's original complaint showed that he failed to perform
26 his obligations in July 2009 when he defaulted on his loan and
27 that this contradicts his allegation in the 1AC that he was
28 current on his loan in 2009 when Bank of America accelerated it.

1 Mot. at 7. However, the allegations in the complaints are not
2 actually contradictory. In the original complaint, Plaintiff
3 stated that he made payments based on Defendants' calculations
4 until June 2009 and that, at that time, it became difficult to
5 keep up with the adjusted payments, leading him to ask Defendants
6 questions. Compl. ¶ 39. In both complaints, he says that he made
7 the required payments until Bank of America breached the contract
8 in 2009 and subsequently began refusing to accept his payments.
9 Thus, Plaintiff did sufficiently plead his performance or excuse
10 for non-performance.

11 Finally, Defendants argue that Plaintiff did not properly
12 allege damages because he generally stated that he "suffered
13 damages as a result of Defendant's breach of the contract and has
14 been forced to file a legal complaint," 1AC, at ¶ 19, without
15 specifically pleading what damages he suffered. Defendants also
16 contend that any damage Plaintiff may have suffered was due to his
17 own failure to perform his loan obligations. It is true that
18 Plaintiff has not made clear what damages he suffered as a result
19 of Bank of America's alleged breach. However, when taking all
20 material allegations as true and construing them in the light most
21 favorable to Plaintiff, any harm that he suffered was not due to
22 his own failure to satisfy his outstanding loan requirement,
23 because he was current on his loan payments at the time that Bank
24 of America breached its obligations.

25 Accordingly, the Court GRANTS Defendants' motion to dismiss
26 Plaintiff's breach of contract claim against Bank of America with
27 leave to amend to correct the deficiencies identified above, if
28 this can be done truthfully.

1 3. RESPA claim against BAC Home Loan Servicing
2 Plaintiff brings a new cause of action for violation of the
3 RESPA against BAC Home Loan Servicing. Plaintiff alleges that he
4 made at least one qualified written request for information to BAC
5 Home Loan Servicing seeking information regarding the amount
6 apparently owed on the loan and its authority in relation to a
7 debt that had originated with Bank of America. Plaintiff also
8 claims that BAC Home Loan Servicing failed to respond to his
9 request for information, in violation of 12 U.S.C. § 2605.

10 Defendants argue that Plaintiff's RESPA claim is barred by
11 the statute of limitations. The limitations period for section
12 2605 claims is three years from the date of the occurrence of the
13 violation, not from the date of the closing of the loan, as
14 Defendants contend. See 12 U.S.C. § 2614. While Plaintiff does
15 not allege the date on which he made his written request, he
16 states that the request was related to the dispute about the
17 amount of money owed and to BAC Home Loan Servicing's authority to
18 foreclose, which appear to have been at issue in 2009 and 2010.
19 See 1AC at ¶¶ 13-15, 21. Thus, a section 2605 claim premised on
20 Plaintiff's request for documents from BAC Home Loan Servicing may
21 not be time-barred.

22 Plaintiff, however, does not adequately plead that he sent
23 BAC Home Loan Servicing a proper qualified written request. RESPA
24 places a duty upon loan servicers to respond to "qualified written
25 requests." Lawther v. Onewest Bank, 2010 U.S. Dist. LEXIS 131090,
26 at *6 (N.D. Cal.). A qualified written request is one that
27 includes identifying information about the borrower and provides
28 "a statement of the reasons for the belief of the borrower, to the

1 extent applicable, that the account is in error or provides
2 sufficient detail to the servicer regarding other information
3 sought by the borrower." 12 U.S.C. § 2605(c)(1). The request
4 must be related to the servicing of the loan. Lawther, 2010 U.S.
5 Dist. LEXIS 131090, at *6. While Plaintiff alleges that he sent a
6 letter that he calls a qualified written request seeking
7 information regarding the servicing of the loan, he does not plead
8 that he provided identifying information in the letter or that he
9 explained the reasons for his belief in the inaccuracy of the
10 reports.

11 Plaintiff also fails to plead any actual damages as a result
12 of the alleged failure to respond. If a loan servicer fails to
13 comply with the provisions of section 2605, a borrower is entitled
14 to any actual damages resulting from the failure. Id. The
15 plaintiff must include, at the pleading stage, a demonstration of
16 some actual pecuniary loss. Id. The plaintiff must also allege a
17 causal relationship between the alleged damages and the RESPA
18 violation. Id. at *7.

19 Accordingly, the Court GRANTS Defendants' motion to dismiss
20 Plaintiff's RESPA claim against BAC Home Loan Servicing, with
21 leave to amend to correct the deficiencies identified above, if
22 this can be done truthfully.

23 4. Request for preliminary injunctive relief against
24 Bank of America

25 Plaintiff asserts a claim asking that the Court "temporarily
26 enjoin Defendants, and each of them, from conducting a trustee
27 sale of the Subject Property until the Court may determine the
28 legal issues herein as a matter of law and a hearing on the

1 merits." 1AC, at ¶ 25. Plaintiff does not seek a permanent
2 injunction. Because a preliminary injunction is not a cause of
3 action and is instead a form of interim relief, intended to
4 maintain the status quo during adjudication of a party's
5 substantive claims, the Court construes Plaintiff's claim as a
6 request for a preliminary injunction. While the title of the
7 section in the 1AC addressing a preliminary injunction
8 specifically refers to TILA violations, Plaintiff's request
9 appears to be premised on all of the causes of action he asserts
10 against Defendants. See 1AC ¶ 26 ("Plaintiff seeks to enjoin the
11 pending sale pending resolution of the numerous issues outlined in
12 the Complaint herein.").

13 This appears to be a re-assertion of Plaintiff's request for
14 a preliminary injunction, which was contained in his original
15 complaint. This Court previously denied Plaintiff's first request
16 for a preliminary injunction, because Plaintiff had failed to
17 respond to Defendants' argument that he did not meet the
18 requirements for a preliminary injunction. Order Granting Defs.'
19 Mot. to Dismiss, at 9-10. Plaintiff again has not addressed the
20 requirements that "he is likely to succeed on the merits, that he
21 is likely to suffer irreparable harm in the absence of preliminary
22 relief, that the balance of equities tips in his favor, and that
23 an injunction is in the public interest." Winter v. Natural Res.
24 Def. Council, Inc., 555 U.S. 7, 20 (2008). Accordingly,
25 Plaintiff's request for a preliminary injunction is DENIED.

26 Defendants seek to dismiss Plaintiff's request for a
27 preliminary injunction from the 1AC, and to strike any references
28 to injunctive relief, because this Court had previously "dismissed

1 it without leave to amend." Mot. to Dismiss, at 11. However, as
2 previously explained, a preliminary injunction is not a cause of
3 action. This Court did not previously dismiss Plaintiff's request
4 with prejudice; instead, the Court denied his first request,
5 because he had not made a showing that the requirements for
6 issuance of a preliminary injunction were met at that time. Thus,
7 the Court DENIES Defendants' request to strike references to
8 injunctive relief. Plaintiff may renew his request for a
9 preliminary injunction as a properly filed motion demonstrating
10 that he meets the elements set forth above, if he files an amended
11 complaint remedying the deficiencies in his substantive claims for
12 which this Court has granted him leave to do so.

13 5. Fraud and misrepresentation claim against Bank of
14 America

15 Plaintiff re-asserts a claim for misrepresentation and fraud,
16 which the Court had previously dismissed with leave to amend,
17 based on Bank of America's conduct at the time he executed his
18 loan documents in August 2007. He also alleges that, during the
19 life of the loan, Defendants committed fraud by improperly
20 crediting payments he made and incorrectly calculating the
21 interest applied to his loan.

22 Defendants argue that this claim is time-barred, based on
23 California Code of Civil Procedure section 338(d), which imposes a
24 three-year limitations period on claims based "on the ground of
25 fraud or mistake," except that such claims are "not deemed to have
26 accrued until the discovery, by the aggrieved party, of the facts
27 constituting the fraud or mistake." Cal. Code Civ. Proc.
28 § 338(d). The alleged misconduct at the time of the origination

1 of the loan occurred in August 2007, outside of the limitations
2 period. As in his opposition to the first motion to dismiss,
3 Plaintiff again insists that he nevertheless may seek liability
4 for this alleged misconduct because he did not discover it until
5 June 2009; Plaintiff does not argue that Defendants fraudulently
6 concealed the misrepresentations.

7 To invoke the delayed discovery rule, Plaintiff must
8 "specifically plead facts to show (1) the time and manner of
9 discovery and (2) the inability to have made earlier discovery
10 despite reasonable diligence." E-Fab, Inc. v. Accountants, Inc.
11 Servs., 153 Cal. App. 4th 1308, 1324 (2007) (emphasis in original;
12 citation and internal quotation marks omitted). The only factual
13 allegation that he has added to his 1AC is that he "did not learn
14 of the contractual fraud and misrepresentations until 2009 when he
15 discovered that the calculations did not match" and that he "could
16 not have known of the improper accounting until he was notified
17 that the financial institutions considered him to be in default
18 under the loan agreement." 1AC, at ¶ 39. Plaintiff has not plead
19 facts that show the time and manner of discovery or his reasonable
20 diligence. For example, Plaintiff offers no explanation as to
21 why, despite reasonable diligence, he could not have learned
22 earlier that the interest rate he was being charged was not what
23 it should have been based on the documents he signed in August
24 2007, which specifically stated that the initial interest rate for
25 the loan was 8.125% until at least October 1, 2012. RJN, Ex. A,
26 at 2. Thus, Plaintiff has not plead facts sufficient to support
27 the application of the delayed discovery rule to his claim based
28 on conduct that occurred outside of the limitations period.

Defendants also argue that Plaintiff has not plead the facts supporting this claim with sufficient particularity. Under California law, "[t]he elements of fraud, which gives rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173 (2003) (quoting Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996)). "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. Proc. 9(b). The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place and nature of the alleged fraudulent activities are sufficient, id. at 735, provided the plaintiff sets forth "what is false or misleading about a statement, and why it is false." In re GlenFed, Inc., Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994). "When a claim of fraud is made against a corporation, the complaint 'must set forth specific names of the persons who made the misrepresentation, their authority to speak for the corporation, to whom they spoke, what they said or wrote, and when it was said or written.'" Banaga v. Taylor Bean Mortg. Co., 2011 U.S. Dist. LEXIS 122804, at *15 (N.D. Cal.) (quoting Tarmann v. State Farm Mutual Auto Ins. Co., 2 Cal. App. 4th 153 (1991)). Scienter may be averred generally, simply by saying that it

1 existed. Id. at 1547; see Fed. R. Civ. Proc. 9(b) ("Malice,
2 intent, knowledge, and other condition of mind of a person may be
3 averred generally"). Allegations of fraud based on information
4 and belief usually do not satisfy the particularity requirements
5 of Rule 9(b); however, as to matters peculiarly within the
6 opposing party's knowledge, allegations based on information and
7 belief may satisfy Rule 9(b) if they also state the facts upon
8 which the belief is founded. Wool v. Tandem Computers, Inc., 818
9 F.2d 1433, 1439 (9th Cir. 1987).

10 Plaintiff makes only general allegations regarding
11 purportedly fraudulent conduct during the life of the loan after
12 origination. Plaintiff also does not plead his claim based on
13 conduct at the time he executed his loan documents in August 2007
14 with sufficient particularity. Plaintiff alleges that certain
15 misrepresentations were made by "Jared, the mortgage broker" and
16 states, without any elaboration, that he was an "agent" of Bank of
17 America. However, "a plaintiff must allege more than conclusory
18 allegations regarding an agency relationship when normally, as a
19 matter of law, a broker is the agent of the borrower not the
20 lender." Abels v. Bank of Am., N.A., 2012 U.S. Dist. LEXIS 28125,
21 at *19 (N.D. Cal.) (citing Montoya v. McLeod, 176 Cal. App. 3d 57,
22 64 (1985)). Plaintiff also states that the interest rate that
23 Defendants disclosed does not match the calculations that they
24 represented to him. However, in the 1AC, Plaintiff does not
25 provide any specific details regarding these alleged
26 misrepresentations, including which documents had differing
27 interest rates or calculations and how these were fraudulent.
28

1 Accordingly, the Court GRANTS Defendants' motion to dismiss
2 Plaintiff's fraud and misrepresentation claim against Bank of
3 America. Because Plaintiff has had an opportunity to correct this
4 deficiency, dismissal is without leave to amend.

5 6. Rescission claim against Bank of America based on
6 TILA violations and fraud

7 Plaintiff re-asserts a claim seeking rescission of the
8 mortgage contract. He previously alleged a claim for rescission
9 of the contract as a voidable cognovit note, which the Court
10 dismissed with leave to amend. Plaintiff now seeks rescission
11 based on Bank of America's purported fraud and TILA violations.
12 1AC, at ¶ 43. To the extent that Plaintiff's rescission claim is
13 premised on his fraud claim, the Court GRANTS Defendants' motion
14 to dismiss it without leave to amend for the reasons set forth
15 above.

16 Defendants argue that rescission under TILA is barred by a
17 three year statute of limitations. "If proper notice of
18 rescission rights is not delivered to the consumer at the time of
19 closing, and the lender fails to cure the omission by subsequently
20 providing the proper information, the consumer's usual right to
21 rescind within three days of closing is extended to three years."
22 Miguel v. Country Funding Corp., 309 F.3d 1161, 1163 (9th Cir.
23 2002) (citing 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3)).
24 "[S]ection 1635(f) of TILA represents an 'absolute limitation on
25 rescission actions' which bars any claims filed more than three
26 years after the consummation of the transaction." Id. at 1164
27 (quoting King v. California, 784 F.2d 910, 913 (9th Cir. 1986)).
28 "Section 1635(f) is therefore not merely a statute of

1 limitations--it completely extinguishes the underlying right
2 itself." McOmie-Gray v. Bank of Am. Home Loans, 2012 U.S. App.
3 LEXIS 2448, at *10 (9th Cir.). Because Plaintiff filed this
4 action on January 21, 2011, more than three years after the
5 closing of his loan on August 23, 2007, Plaintiff's claim for
6 rescission under TILA is barred.

7 Accordingly, the Court GRANTS Defendants' motion to dismiss
8 Plaintiff's claim for rescission based on TILA violations with
9 prejudice.

10 7. UCL claim against all Defendants

11 Plaintiff re-asserts claims against all Defendants for unfair
12 business practices. The Court previously dismissed this claim
13 with leave to amend.

14 California's Unfair Competition Law (UCL) prohibits any
15 "unlawful, unfair or fraudulent business act or practice." Cal.
16 Bus. & Prof. Code § 17200. The UCL incorporates other laws and
17 treats violations of those laws as unlawful business practices
18 independently actionable under state law. Chabner v. United of
19 Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).
20 Violation of almost any federal, state or local law may serve as
21 the basis for a UCL claim. Saunders v. Superior Court, 27 Cal.
22 App. 4th 832, 838-39 (1994). In addition, a business practice may
23 be "unfair or fraudulent in violation of the UCL even if the
24 practice does not violate any law." Olszewski v. Scripps Health,
25 30 Cal. 4th 798, 827 (2003). Claims under the UCL must be brought
26 "within four years after the cause of action accrued." Cal. Bus.
27 & Prof. Code § 17208.
28

1 Plaintiff's UCL claim is based on Defendants' alleged
2 fraudulent conduct. Plaintiff fails to allege fraud against any
3 Defendant with sufficient particularity. Accordingly, the Court
4 GRANTS Defendants' motion to dismiss this claim. Because
5 Plaintiff has had an opportunity to correct this deficiency,
6 dismissal is without leave to amend.

7 II. Motion to Strike

8 Defendants have also filed a motion to strike certain
9 allegations in Plaintiff's 1AC and his request for attorneys'
10 fees. Because the Court has dismissed all of Plaintiff's causes
11 of action, Defendants' motion to strike is DENIED AS MOOT.

12 Because Plaintiff may choose to file a second amended
13 complaint and include a request for attorneys' fees therein, the
14 Court notes that Plaintiff has not plead a valid basis for
15 attorneys' fees in the 1AC.

16 Defendants argue that Plaintiff may not recover attorneys'
17 fees, because he is proceeding pro se and has not incurred any
18 attorneys' fees thus far. However, although Plaintiff is
19 currently proceeding pro se, he may retain counsel at some point
20 during the litigation.

21 Defendants also argue that Plaintiff has not plead a
22 statutory or contractual basis for an award of attorneys' fees.
23 Attorneys' fees may be recovered only where provided by statute or
24 contract. Cal. Code Civ. Proc. § 1021; Amtower v. Photon
25 Dynamics, Inc., 158 Cal. App. 4th 1582, 1601 (2008). The 1AC does
26 not specify a statutory or contractual basis for an award of
27 attorneys' fees. If Plaintiff can remedy this deficiency, he may
28 include a prayer for attorneys' fees in an amended complaint.

1 The Court notes that there are provisions in the Adjustable
2 Rate Note and Deed of Trust, of which Defendants requested that
3 the Court take judicial notice, that appear to authorize the
4 lender and note holder to collect attorneys' fees in certain
5 circumstances. See RJN, Ex. A (Adjustable Rate Note), ¶ 7.D; RJN,
6 Ex. B (Deed of Trust), ¶ 22. The Court further notes that
7 California Civil Code section 1717 makes unilateral fee
8 provisions, such as these, applicable to both parties to a
9 contract. See Kachlon v. Markowitz, 168 Cal. App. 4th 316, 347
10 (2008).

11 CONCLUSION

12 For the reasons set forth above, the Court GRANTS Defendants'
13 motion to dismiss the 1AC and DENIES Defendants' motion to strike
14 (Docket Nos. 41 and 42).

15 Plaintiff is granted leave to amend his breach of contract
16 claim against Bank of America and his RESPA claim against BAC Home
17 Loan Servicing to address the deficiencies noted above. Plaintiff
18 may renew his request for a preliminary injunction as a properly
19 noticed motion, once his amended complaint is answered. In an
20 amended complaint, Plaintiff may include a prayer for attorneys'
21 fees if he is able to allege a statutory or contractual basis for
22 such an award against Bank of America and/or BAC Home Loan
23 Servicing. In an amended complaint, Plaintiff shall not renew any
24 claims other than the two noted herein and shall not raise any new
25 claims.

26 If Plaintiff intends to file an amended complaint, he shall
27 do so within fourteen days of the date of this Order. If
28 Plaintiff files an amended complaint, Defendants shall respond to

1 it within fourteen days after it is filed. If Defendants move to
2 dismiss the amended complaint, Plaintiff shall respond to
3 Defendants' motion within fourteen days after it is filed.
4 Defendants' reply, if necessary, shall be due seven days after
5 Plaintiff files his response. Any motion to dismiss will be
6 decided on the papers. Plaintiff's failure to comply with this
7 Order will result in the dismissal of his claims for failure to
8 prosecute.

9 IT IS SO ORDERED.

10
11 Dated: 3/19/2012


CLAUDIA WILKEN
United States District Judge

United States District Court
For the Northern District of California